UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ARAKELIAN ENTERPRISES, INC., d/b/a ATHENS SERVICES, Respondent, -and- **INTN'L BHD OF TEAMSTERS, LOCAL 396,** Charging Party.	Cases 31-CA-223801 31-CA-226550 31-CA-232590 31-CA-237885

RESPONDENT'S ANSWERING BRIEF TO THE CHARGING PARTY'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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Respondent Arakelian Enterprises, Inc. d/b/a Athens Services' ("Athens"),[1] by and through its attorneys Epstein Becker & Green, P.C., and pursuant to Section 102.46 of the National Labor Relations Board's ("Board") Rules and Regulations, hereby files its Answering Brief to Charging Party Teamsters Local 396's ("Union") Exceptions to Administrative Law Judge Jeffrey D. Wedekind's ("ALJ" or "Judge Wedekind") Decision ("Decision") in cases 31-CA-223801, 31-CA-226550, 31-CA-232590, and 31-CA-237885.[2] As described below, Athens respectfully requests that the Board dismiss the Union's Exceptions and adopt Judge Wedekind's findings that: Athens did not violate Section 8(a)(1) of the National Labor Relations Act ("Act") regarding an alleged threat to Csildo Garcia ("Garcia"), Athens did not violate Section 8(a)(1) of the Act by allegedly interrogating Michael Bermudez ("Bermudez") about his union sympathies, Athens did not violate Section 8(a)(1) or 8(a)(3) of the Act when it terminated Bermudez, and Athens did not violate Section 8(a)(1) or 8(a)(3) of the Act by disciplining Damian Weicks ("Weicks").

I. INTRODUCTION.

This case involves a series of meritless blocking charges filed by the Union transparently designed to delay employees' right to have decertification elections.[3] Specifically, pursuant to a card check under the parties' Labor Peace Agreement,[4] the Union represents three separate

[1] Athens has been providing waste collection and recycling services in Southern California for over 60 years. Founded in 1957, Athens began as a small family-run business. Athens is still a family-run company today, but it now employs nearly 1,600 employees Companywide and has grown into one of the largest independent (non-national) waste collection companies in the Los Angeles area with a significant percentage of the City of Los Angeles ("City" or "Los Angeles") market share. Tr., 2118:3-5 (Torres); Jt. Ex. 1, No. 1.

[2] Hereinafter "ALJD" refers to pages of the Administrative Law Judge Decision, "UX" refers to the Union's Exceptions to Judge Wedekind's Decision, "UBX" refers to the pages of the Union's Brief in Support of its Exceptions, "Tr." refers to the pages of the Official Transcript of Hearing, "GC Ex." refers to the General Counsel's Exhibits, "Er. Ex." refers to the Athens' Exhibits, and "Jt. Ex." refers to the Joint Exhibits.

[3] *See* Athens' Request for Extraordinary Relief and Request for Review filed on February 21, 2020, in Case Number 31-RD-223309.

[4] As detailed in Athens' post-hearing brief and Judge Wedekind's decision, the City of Los Angeles passed an ordinance that required Athens to enter into a "labor peace agreement" with the Union in order to keep a substantial

bargaining units, one unit for Athens' Pacoima Yard, Sun Valley Yard and Torrance Yard respectively (collectively LA Yards).[5] On July 6, 2018, employees from each of the LA Yards filed separate decertification petitions in Case Nos. 31-RD-223309 (Pacoima), 31-RD-223335 (Sun Valley), and 31-RD-223318 (Torrance). In response, the Union filed charge 31-CA-223801 the next week to block the petitions. The Union then proceeded to amend and file additional charges for the next 8 months, successfully continually pushing back a resolution of the block. In August of 2019, Judge Wedekind presided over a 10 day hearing. On December 30, 2019, Judge Wedekind issued a well-reasoned 51 page Decision dismissing almost all of the allegations, largely based on credibility determinations.

The Union filed exceptions related to several of Judge Wedekind's dismissals and findings related to the LA Yards.[6] Throughout the entirety of the Union's Exceptions (9-12) and sub-exceptions, the Union attempts to distort both the record and Judge Wedekind's well-reasoned Decision. However, as detailed below, a comprehensive review of Judge Wedekind's Decision and the record show that the Union's Exceptions are completely meritless. Moreover, a majority of the Union's Exceptions are regarding credibility resolutions and the Union utterly fails to meet the high burden required for overturning a credibility resolution. Accordingly, the Board should dismiss all of the Union's Exceptions and uphold Judge Wedekind's findings.[7]

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portion of its existing business in the City of Los Angeles. *See* ALJD, at 1-2; Athens Post-Hearing Brief, at 3-5, Section II(B).

[5] The "Pacoima" Yard is also referred to as "LANO," the "Sun Valley" Yard is also referred to as the "Peoria" Yard, and the "Torrance" Yard is also referred to as "LASO."

[6] The General Counsel separately filed exceptions related only to the Pacoima Yard.

[7] The Union adopted and incorporated the General Counsel's Exceptions numbers 1-8. UX, at 1. As explained in Athens' Answering Brief to the General Counsel's Exceptions, the General Counsel's Exceptions should also be dismissed.

II. THE UNION'S EXCEPTION NUMBER 9 SHOULD BE DISMISSED AS JUDGE WEDEKIND CORRECTLY HELD THAT ATHENS SERVICES DID NOT VIOLATE SECTION 8(A)(1) OF THE ACT REGARDING AN ALLEGED THREAT MADE TO CSILDO GARCIA.

The Union files exceptions to Judge Wedekind's dismissal of the incredulous and suspiciously timed allegation that, even though the charge was filed one week after the filing of the decertification petitions, four to seven months prior to that filing, Garcia had been allegedly threatened with termination by a manager who he had never spoken with before. UX, # 9(a)-(d).[8] The entirety of the Union's exceptions regarding Garcia are based on Judge Wedekind's credibility resolutions. As the Board has stated in countless cases, "[t]he Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951)." Moreover, "[b]ecause a Trial Examiner has the opportunity of observing the demeanor of witnesses who are testifying, it is the established policy of the Board to attach great weight to his credibility findings and it will not overrule them unless they clearly appear to be unreasonable." *E. Coal Corp.*, 79 NLRB 1165, 1166 (1948) (citations omitted). The Union has not even come close to meeting this high standard here. Rather, it is extremely clear from the record that Judge Wedekind's credibility resolutions were well-founded.

Judge Wedekind made it clear from the outset that he relied on the witnesses' demeanor, as well as many other factors, in determining the credibility of the witnesses:

> In making credibility findings, all relevant and appropriate factors have been considered, **including the demeanor** and interests of the witnesses; whether their testimony is corroborated or consistent with the documentary evidence and/or the established or admitted facts; inherent probabilities; and reasonable inferences that may be drawn from the record as a whole. See, e.g., *Daikichi Sushi*, 335 NLRB 622, 623 (2001), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003); and *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1465 (9th Cir.), cert.

[8] Garcia is employed as a "driver's helper" at the Pacoima Yard.

> denied 522 U.S. 948 (1997). Careful consideration has also been given to the way the testimony was adduced by counsel. For example, in general, less weight has been afforded testimony of nonadverse witnesses about disputed matters that was adduced by counsel on direct examination through leading questions, particularly where there was no demonstrated or apparent need to refresh the witnesses' memory or rephrase their prior testimony to develop a full and clear record. See FRE 611(c); and *ODS Chauffeured Transportation*, 367 NLRB No. 87, slip op. at 1 (2019).

ALJD, at 3 n.9 (emphasis added).[9]

The Union attempts to assert that "the ALJ did not base his credibility determination on demeanor, but on purported, objective 'inconsistencies' in [Garcia's] testimony." UBX, at 3 n.2. This is wrong on multiple counts. First, as expressly stated in his decision, Judge Wedekind considered the demeanor of all of the witnesses when making his credibility findings. ALJD, at 3 n.9. Second, inconsistences are one of the many factors judges may look to when considering the demeanor of a witness. The Board has listed "specific basis for a demeanor-based credibility resolution," which include "nervousness of the witness, **self-contradiction**, evasiveness, etc." *Atlantic Veal & Lamb, Inc.*, 342 NLRB 418, 420 (2004). Thus, it was appropriate for Judge Wedekind to consider Garcia's many inconsistencies when evaluating his demeanor and credibility. Moreover, while the Union attempts to break down each inconsistency into separate categories, it is important to remember that Judge Wedekind looked at the many inconsistencies

[9] While it may be best practice for judges to give a specific basis for credibility resolutions, as Judge Wedekind did throughout his opinion, general credibility statements with far less specificity than Judge Wedekind's statement by themselves are accepted by the Board. *See Atlantic Veal & Lamb, Inc.*, 342 NLRB 418 (2004). In *Atlantic Veal & Lamb* the administrative law judge made a far less specific claim regarding his findings: "Upon the entire record of the case, including my observation of the demeanor of the witnesses, I make the following [findings,]" *Id.* at 423. Furthermore, the administrative law judge did not give specific analysis on each witness's credibility, but simply stated throughout the opinion "I credit [witness's name] testimony." *Id.* at 422, 425-27. While the Board did note that it would be best practice if judges gave specific basis for credibility determinations, a majority of the Board found that "the record is sufficient in order for us to make our findings in this case." *Id.* at 420. Accordingly, even if Judge Wedekind had only made this statement at the beginning of his decision regarding credibility, his credibility resolutions should still be upheld. Nonetheless, Judge Wedekind went to great lengths to explain each and every one of his credibility decisions.

during Garcia's short testimony as a whole, as well as other factors, to decide that he was not a credible witness.

Additionally, the Union completely ignores the fact that Garcia was found to have lied while testifying based on video evidence presented during the hearing and that Athens Assistant General Manager Tomas Solis ("Solis") was a credible witness who completely denied this accusation.

A. Judge Wedekind correctly held that Garcia's testimony was inconsistent regarding Garcia's involvement in the Union.

The Union's desperate and misleading attempts to claim that Garcia was not lying by stating that he was "neither for [the Union] or against it," are completely unsupported by the record. UX, # 9(a); UBX, at 3. Rather, it is evident, as Judge Wedekind put it, that "the record indicates that Garcia was not as uninformed and uninterested regarding the Union as he professed." ALJD, at 4:32-33. As noted above and below, Garcia blatantly lied about a different event regarding the Union, which was caught on video. Here, Garcia's testimony regarding his support for the Union was nothing less than evasive and unbelievable. When Garcia was asked if anybody brought him to the hearing, he stated he "was able to get a ride." Tr., 45:21-23 (Garcia). When a follow up question was asked on who gave him the ride he responded by stating "I got a ride from a guy." Tr., 45:24-25 (Garcia). These are not the answers of an open and honest witness. Further, Garcia incredulously did not know the man's name even though he admitted that he asked the man for a ride and eventually, albeit reluctantly, admitted that he knew the man from the Union and that he met him at the Union. Tr., 46:1-23 (Garcia).

Putting Garcia's testimony even further into doubt, Teamsters Organizer Gilberto Lopez openly testified that Garcia was "a regular" and that Garcia "always stops by [the Union tent] on

his way home." Tr., 820:16-23 (Lopez). Accordingly, it is clear that Judge Wedekind's reasons for doubting Garcia's testimony were founded in the record.

Moreover, the Union's arguments here are flat out egregious: "Garcia's unwillingness to be forced to reveal the nature of his support for the union in front of his employer more than a year after the events in question cannot possibly be a basis for discrediting his testimony about those events." UBX, at 3. The Union is arguing that it would be okay for Garcia to lie about his relationship with the Union while he is under oath on the stand. Unquestionably it is not okay for a witness to lie on the stand and this is a sad attempt by the Union to cover up Garcia's evasive and self-contradicting demeanor. Accordingly, Judge Wedekind correctly took into account Garcia's inconsistent and evasive testimony regarding his involvement in the Union when considering his credibility.

B. Judge Wedekind correctly held that Garcia's testimony about the incident contained troubling inconsistencies.

The Union tries to once again downplay Garcia's self-contradicting testimony by stating that his inconsistent testimony regarding the alleged interaction between him and Tomas Solis was "minor." UX, # 9(b). The Union cites to "*Doral Building Services*, 273 NLRB 454, 454 fn. 3 (1984)," to support this argument. Nonetheless the Union's parenthetical statement regarding *Doral Building Services*, "minor inconsistencies do not diminish employees' credibility," is misleading. UBX at 4. The full quote from the Board is that "we agree with the judge that the inconsistencies that do exist are minor and do not diminish the employees' credibility as established in part by their demeanor." *Doral Building Services*, 273 NLRB 454, 454 n.3 (1984) (emphasis added). In that case, the employees' had establish credibility through other reasons, such as their demeanor, despite their minor inconsistencies and the Board did not disturb the judge's findings as a result. Garcia however did not establish himself as a credible witness in

anyway shape or form. He did not have some "minor" inconsistencies but was inconsistent regarding almost the entirety of his relevant testimony. Moreover, rather than building his credibility in other areas, Garcia was shown to have directly lied on the stand through video evidence.

The relevant part of the testimony referred to here is listed below.

> A: I told him I would wait and see if he took my neck.
> Q: Did Tomas respond to you?
> A: No (in English).
> No. He did not say anything further. It ended right there.

Tr., 40:9-13 (Garcia).

Moments later, however, he testified:

> Q: And so you told him, you still weren't going to sign?
> A: So yeah, I said I would wait until he took my neck and he said, anybody who didn't sign was going to have their neck taken.

Tr., 48:23-49:1 (Garcia). By comparing Garcia's testimony side by side, it is abundantly clear that he changed his story regarding the alleged incident. At first he was clear in stating that after he told Solis that he would wait and see if he took his neck that the conversation "ended right there," with nothing more from Solis. However, just a few minutes later, Garcia testified that Solis allegedly did make a last statement regarding an alleged wide-spread threat to all employees who did not sign. This inconsistency goes to show that Garcia and the Union fabricated the entire alleged interaction between Garcia and Solis and that his testimony should not be credited. Accordingly, Judge Wedekind correctly considered this inconsistency when deciding that Garcia was not a credible witness. ALJD, at 4:39-5:2.

C. Garcia's own testimony establishes that he never told the Union about this alleged incident.

The Union's third exception regarding Judge Wedekind's credibility resolutions of Garcia centers around the Union's argument that "Garcia *did* mention the incident to the union later, which is the reason that unfair labor practice charges were filed in July 2019." UBX, at 5 (emphasis in the original); UX, # 9(c). It is hard to know whether, by making this statement, the Union is being careless or purposefully misleading the Board. It is notable that the Union did not provide a citation to the record regarding this claim, especially considering that Garcia's testimony directly contradicts the Union's argument. Garcia was asked when he first told the Union about this alleged interaction with Solis, Garcia testified that "I didn't tell anyone at the Union anything." Tr., 47:23-25 (Garcia). Garcia was then asked who he told about the incident and he responded with "no one." Tr., 48:1-2 (Garcia). It is inescapably clear that Garcia testified, under oath, that he did not tell the Union about the interaction, and yet the Union is trying to argue that Garcia did in fact tell the Union about the incident at a later date. This is perplexing, especially considering that the Union quoted this part of the transcript in their brief five lines after claiming that Garcia did mention the incident to the Union. UBX, at 5. It is possible that the Union was simply lazy in drafting their brief, but given the amount of times they have attempted to twist and misshape the record, it seems more likely that the Union made this argument in a knowing attempt to obfuscate and twist the record facts.

Nonetheless, as Judge Wedekind concluded, "it seems unlikely [Garcia] would not have mentioned such a remarkable incident to [the Union] if it had actually happened." ALJD, at 5:9-11. Despite the Union's plainly wrong assertion, Garcia denied informing the Union about this alleged interaction. Accordingly, Judge Wedekind was justified in taking this improbability into consideration when considering the credibility of Garcia. *See E. Coal Corp.*, 79 NLRB at 1166

("In this case, in addition to basing his credibility findings upon his observance of the witnesses' demeanor on the stand, the Trial Examiner . . . took note of such demonstrable factors as the **inherent probability or lack of probability of testimony**, **contradiction of a witness on a material matter by his own contrary statement** or **by another witness called by the same party**) (emphasis added); *Daikichi Corp.*, 335 NLRB 622, 623 (2001) ("Where demeanor is not determinative, an administrative law judge properly may base credibility determinations on the weight of the respective evidence, established or admitted facts, **inherent probabilities**, 'and **reasonable inferences which may be drawn from the record as a whole**.'") (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)) (emphasis added).

Lastly, the Union attempts to make much ado about nothing by claiming that there is "no evidence" that Garcia had contact with the Union representatives at the time in question. UBX, at 4. First off, the Union and the Counsel for the General Counsel failed to ever establish when this incident occurred. Garcia himself was unclear. Tr., 38:17:19, 46:24-47:8 (Garcia).[10] While the Union makes the assertion that this incident occurred in March or April, Garcia testified that it could have occurred in January of 2018 (outside the 10(b) period). UBX, at 4; tr., at 47:6-8 (Garcia). Second, it seems unlikely that Garcia would not have had contact with the Union at the time of this alleged incident given that according to Teamsters Organizer Gilberto Lopez, Garcia was a regular who always stopped by the Union Tent on his way home. Tr., 820:16-23 (Lopez). Nonetheless, this is a moot point, seeing how Garcia admitted, despite the Union's bad faith claim, that he never said anything to the Union about this incident. Tr., 47:23-25 (Garcia).

[10] In fact, it is not even clear if it allegedly occurred within the 10(b) period.

Accordingly, Judge Wedekind was justified in taking into account the oddity that Garcia testified that he never mentioned this alleged incident to the Union when determining Garcia's credibility.

D. Judge Wedekind correctly held that Garcia's testimony regarding the presence of others during the alleged incident was inconsistent.

The Union claims that Judge Wedekind mischaracterized Garcia's testimony and that Garcia's testimony was consistent regarding the presence of others during the alleged incident. UX, # 9(d). However, like the Union's other accusations and claims, this can easily be proven false by looking to the transcript. Garcia first testified that he did not know whether anyone else was a part of this conversation. Tr., 40:25-41:1 (Garcia). However, on cross, Garcia testified that he was by himself when this alleged incident occurred. Tr., 47:9-12 (Garcia). However, a few moments later, Garcia yet again changed his story and claimed that "there were other people standing around" during the incident but he didn't know who they were. Tr., 48:2-3 (Garcia). Thus, Garcia changed his testimony on this "very short, very short" alleged incident three times in order to cover up for other inconsistencies in his testimony (i.e., no explanation of how the Union would have found out about this alleged incident if he did not tell anyone). Tr., 40:24 (Garcia).

The Union not only ignores the testimony of Garcia but also attempts to twist Judge Wedekind's words. Judge Wedekind did not mischaracterize Garcia's testimony by stating that Garcia was suggesting that other people may have told the Union. Rather, Judge Wedekind simply came to the logical conclusion that if Garcia did not mention this alleged incident to anybody, then the only other explanation would be that other employees witnessed the incident and told the Union about it. Possibly the Union is attempting to argue that Garcia did not mention this alleged incident to the Union for some other reason other than he thought a different employee would tell the Union. However, this stands in stark contrast to the Union's already falsely proven claim that Garcia did

mention this incident to the Union. It appears as though the Union cannot keep up with their own endless excuses and misdirection.

Accordingly, Judge Wedekind rightly considered this inconsistency in Garcia' testimony when considering his credibility.

E. Garcia's testimony was directly contradicted by video evidence.

Lastly, the Union conveniently left out the fact that part of Garcia's testimony was inescapably contradicted by video evidence, showing that he was willing to lie on the stand. This troubling inconsistency was rightly taken into account by Judge Wedekind in determining Garcia's credibility. ALJD, at 5 n.10, 11 n.25. This inconsistency was clearly laid out by Athens in its post-hearing brief. Athens Post-Hearing Brief, at 78-79.

Garcia claimed that while leaving work around 5:00 PM on July 12, 2018, Security Guard Kala "Q" Furquan ("Q") grabbed his vest and said to him, in English, that he could not be talking to the Union while wearing his vest. Tr., 41:18-42:1 (Garcia). Thus, Garcia understood that he was not allowed to wear his vest while talking to the Union. However, Garcia does not speak or understand English, but he claimed he understood that he was not supposed to talk to the Union while wearing his vest simply because Q allegedly grabbed his vest. Tr., 41:16-42:1, 51:21-52:3, 51:20-24 (Garcia). However, the video presented by the General Counsel during the Hearing shows the entire interaction and stands in stark contrast to this testimony as it clearly shows that Garcia was not touched by Q. GC Ex. 14(d). Additionally, it was proven by both the testimony of Teamsters Organizer Lopez and the video that Q was always a significant distance away from Garcia. GC Ex. 14(d); tr., 821: 1-5, 821:24-25:1 (Lopez). Thus, there is no possible way that Q grabbed Garcia by the vest at any point. GC Ex. 14(d); tr., 821:24-25:1 (Lopez).

Moreover, as Garcia testified that he was only at the Union tent for a short while and only had one interaction with Q, it is clear that the video reflects what actually happened. Tr., 51:18-

53:8 (Garcia). Accordingly, seeing how Garcia does not speak or understand English and Q clearly did not grab Garcia's vest, there was no way for Garcia to know that Q was telling him not to speak to the Union while wearing his vest (other than the Union later told him what he should say happened). Thus, Judge Wedekind correctly took this fabricated testimony into consideration when determining Garcia's lack of credibility.

F. Tomas Solis was a credible witness who contradicted the testimony of Garcia.

At the beginning of Union's brief on exceptions, they make several unfounded claims against the credibility of Athens Assistant General Manager Tomas Solis. The Board should not consider these arguments as the Union failed to include these credibility "exceptions" in their list of exceptions, and they did not follow the proper procedure required by the Board. UX; UBX, at 2-3; Current NLRB Rules and Regulations § 102.46(a)(1)(ii) ("Any exception which fails to comply with the foregoing requirements may be disregarded."). Nonetheless, the Union's attempts to cloud and undercut Solis' testimony in order to incorrectly bolster the credibility of Garcia can quickly be contradicted. The ridiculousness of this fabricated incident was previously laid out in Athens Post-Hearing Brief. Athens Post-Hearing Brief, at 79-82.

The Union latches on to and distorts the statement made by Solis. The Union claims that Solis testified that "he would not have asked Garcia to sign an anti-union petition because he is not responsible for having employees sign employment policies," and that employment policies were handled by "supervisors and HR personnel." ALJD, at 2-3. This is a blatant misstatement of the record. Solis did testify that if Garcia needed to sign a paper that Solis himself would not ask Garcia but a lower level supervisor or manager would ask him. Tr., 1860:8-19, 1861:12-19 (Solis). There is nothing untrue about this statement. However, the Union once again conveniently ignored the more crucial and relevant portions of the testimony regarding this incident. There was no evasiveness in Solis' testimony, Solis clearly testified that he has never stopped Garcia to ask

him to sign any piece of paper, much less one related to the Union. Tr., 1860:3:7, 1860:20-24 (Solis). Additionally, Solis clearly stated the following: (1) he has never asked an employee to sign any kind of paper to get rid of the Union, (2) he has never threatened to terminate anyone, and (3) he has never told anyone that he would take their neck. Tr., 1862:3-8, 1862:13-1863:2, 1863:7-9 (Solis).

Accordingly, the Union is flat out wrong in claiming that "the ALJD did not address this evasiveness in assessing the relative credibility of the witnesses." UBX, at 3. Rather, there was no evasiveness in Solis' testimony, and Judge Wedekind correctly evaluated Garcia's extreme lack of credibility in dismissing this allegation. ALJD, at 4-5.

Consequently, the Union has utterly failed to meet its high burden necessary to overturn a credibility determination and the Board should not overrule Judge Wedekind's credibility resolutions as they were not only not incorrect, but in fact were well founded in the record. The Union's Exception number 9 (and various sub-exceptions) should be dismissed as Judge Wedekind correctly held that Athens did not violate Section 8(a)(1) of the Act regarding an alleged threat made to Csildo Garcia.

III. THE UNION'S EXCEPTION NUMBER 10 SHOULD BE DISMISSED AS JUDGE WEDEKIND CORRECTLY HELD THAT ATHENS DID NOT VIOLATE SECTION 8(A)(1) OF THE ACT AS EMPLOYEE MICHAEL BERMUDEZ WAS NEVER INTERROGATED ABOUT HIS UNION SYMPATHIES OR SOLICITED TO SUPPORT A DECERTIFICATION OF THE UNION.

The Union's Exception number 10 is in regards to an alleged interrogation and solicitation of employee Bermudez to support the antiunion petition on March 21, 2018. UX, # 10(a)-(e). However, based on various credibility determinations, Judge Wedekind dismissed this allegation. ALJD, at 20-23. In reality, Bermudez, who was a driver at Athens' Torrance/LASO Yard, was called into a meeting with field supervisor Kam Naeole ("Naeole"), Operations Manager Matt Martinez ("Martinez"), and LASO General Manager Michael Leidelmeyer ("Leidelmeyer"). The

reason for this meeting was that another supervisor, Carlos Altamiano, had reported seeing Bermudez on his cell phone while he was operating his waste collection truck, a safety violation. ALJD, at 20:23-27. Bermudez testimony regarding this allegation was filled with fanciful tales, inconsistencies, and improbabilities, all of which were refuted by other credible testimony. These were dismissed for various reasons as properly analyzed by Judge Wedekind. ALJD, at 21-23. The Union excepted to these findings. UX, #10(a)-(e).

As with Garcia, the entirety of the Union's exceptions here are based on Judge Wedekind's credibility resolutions. UX # 10(a)-(e) ("erred by overlooking," "erred in declining to credit," "erred in discrediting," "erred in discrediting," and "erred in deeming."). Notably, only one of the Union's exceptions here even discusses whether Bermudez was actually solicited to support a decertification of the Union. As detailed above, the Board has a long established policy that it will not overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that the credibility resolutions are incorrect. *See Supra* Section I. (Garcia). Additionally, as noted above, Judge Wedekind considered demeanor as well as a multitude of other factors to determine the credibility of the witnesses. *See Supra* Section I. (Garcia); ALJD, at 3 n.9. The Union continues its façade of ignoring the entirety of Judge Wedekind's decision, solely focusing on twisting limited portions of the decision, in a desperate attempt to undermine Judge Wedekind's thorough and complete analysis. The Union rarely cites to the record and does not cite to any case law regarding credibility findings. Moreover, as is true throughout the Union's brief, the Union does not identify when they are talking about each specific exception listed in their "Charging Party Teamsters Local 396's Exceptions to Administrative Law Judge's Decision and Recommended Order" leaving it up to the reader to determine which

exception they are arguing for in that given moment.[11] Nonetheless, the Union's exceptions are easily countered by the record as a whole. For these reasons and those explained below, Judge Wedekind's credibility resolutions should not be overruled.

A. Judge Wedekind did not overlook inconsistencies between the testimony of General Manager Michael Leidelmeyer, Operations Manager Matt Martinez, and Field Supervisor Kam Naeole on the content of a meeting with Bermudez, and the Union's arguments do not accurately reflect the record.

The Union first attempts to attack Judge Wedekind's decision by claiming that "the ALJ made *no effort whatsoever* to assess inconsistencies in the employer witnesses' testimony." UBX, at 7 (emphasis in original); UX, # 10(a). This is a bold statement given the Union makes *no effort whatsoever* to list "multiple" inconsistencies; but rather, makes one easily disproven claim. The Union's single claim of an inconsistency is that the testimony of Leidelmeyer contradicts that of Martinez and Naeole regarding whether Bermudez' disciplinary record was discussed in the meeting with Bermudez, Leidelmeyer, Martinez, and Naeole. However, the Union's brief itself shows that this is not true.

The Union claims that Martinez and Naeole testified that during the meeting, in which possible discipline for Bermudez' use of his cell phone while driving was being discussed, Leidelmeyer reviewed Bermudez' disciplinary record with him. The Union next states that "Leidelmeyer, who was seeking to hew to the employer's line that no discipline had been issued at the meeting, denied that he had reviewed Bermudez' safety record or existing final warning at all." UBX, at 8. However, the transcript, which the Union quotes verbatim, contradicts the Union's argument. Leidelmeyer was asked if there was a discussion about Bermudez' safety

[11] This, of course, is cause enough to dismiss these exceptions. Current NLRB Rules and Regulations § 102.46(a)(1)(ii) ("Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged will be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded.").

disciplinary track *during* the meeting and Leidelmeyer responded: "I don't believe so." Tr., 2075:13-16 (Leidelmeyer). This is not a flat out denial as the Union claims, nor is it a contradiction of the testimony of Martinez and Naeole. Leidelmeyer simply states that he doesn't believe so, meaning, he thinks that he did not review Bermudez disciplinary record during the meeting but he is not fully sure. This is by no means an inconsistency and the Union's argument here falls flat.

Moreover, the Union ignores the fact that Leidelmeyer affirmatively testified that prior to calling Bermudez into the meeting he had knowledge of Bermudez' disciplinary history and he knew that Bermudez already had a final warning for a safety violation. Tr., 2068:15-2069:10 (Leidelmeyer), 2010:24-2011:4 (Martinez). Thus, the substantive issues were consistently testified to and even if there were minor inconsistencies, which there were not, they would be immaterial to the analysis. *Federal Copper & Aluminum Co.*, 193 NLRB 819, 819 n.2 (1971) (rejecting an argument attempting to undermine the credibility of a witness when the alleged discrepancy "would not be material, and, without more, such a minor variance in the testimony of witnesses would hardly serve to vitiate the general credibility of any of them.").

Leidelmeyer's testimony was not inconsistent with that of Martinez and Naeole regarding whether Bermudez' safety disciplinary track was discussed in the meeting. Moreover, the Union fails to point to any other inconsistencies between the testimony of Leidelmeyer, Martinez, and Naeole. In fact, as Judge Wedekind pointed out, the testimonies of Leidelmeyer, Martinez, and Naeole were all consistent regard this meeting with Bermudez. ALJD, at 21:24-32; tr., 1915:7-1917:17 (Naeole), 2007:11-2009:15 (Martinez), and 2077:9-2079:7 (Leidelmeyer). Accordingly, Judge Wedekind correctly credited the consistent testimonies of Leidelmeyer, Martinez, and Naeole over that of Bermudez' inconsistent and self-serving testimony.

B. Judge Wedekind correctly noted the many inaccuracies in Bermudez' testimony regarding the meeting on Bermudez' use of a cell phone while driving.

i. Athens does not have a 6-month probationary period for safety violations.

The Union yet again attempts to distort the record and manipulate Judge Wedekind's decision in order to deceive the Board. The Union inaccurately claims that Athens' disciplinary system contains a 6-month probationary period, thus, the Union argues, Judge Wedekind was wrong to state there is no 6-month probationary period and for discrediting Bermudez for claiming that there was. UBX, at 8; UX, # 10(b). In fact, Athens' does not have a "6-month probationary period;" rather, as explained more fully below, while Athens has a 6-month "look back" period for time and attendance violations, it was firmly established that Athens has a 2-year "look back" period for safety and behavioral/performance violations.[12] This part of Judge Wedekind's decision was discussing a possible discipline for a *safety violation*.

Athens has three different disciplinary tracks: time and attendance, safety, and behavioral/performance. Tr., 1570:9-21 (Ramirez). These tracks indicate that an employee could be at different stages of discipline depending on the disciplinary track. Tr., 1570:22-25 (Ramirez). Thus, when reviewing a discipline, Athens looks at the track that the discipline falls under. Tr., 1571:1-6 (Ramirez). For example, if it's a safety issue, Athens considers the safety track, if it's a performance issue, Athens considers the performance track. Tr., 1571:7-10 (Ramirez). Athens has a two-year look-back time frame regarding the safety and the performance/behavioral tracks. Tr., 1571:11-15 (Ramirez). Thus, Athens does not "look back" at disciplines for safety or performance/behavioral violations that are more than two years old. However, attendance has only a 6-month time frame for looking back at past disciplines. Tr., 1571:16-21 (Ramirez). This is a fact that is acknowledged by the Union. UBX, at 8.

[12] Notably, a "look back" period is a distinct and different thing from a probationary period.

The Union argues that Judge Wedekind's statement that "the Company's progressive discipline system does not even include a 6-month probationary period," is "demonstrably untrue." UBX, at 8; ALJD, at 21:34-35. The Union then tries to distort the rest of Judge Wedekind's paragraph to wrongly claim that Judge Wedekind was mistaken or ignored the record. UBX, at 8. Judge Wedekind was accurate as the record shows that Athens does not have a "6-month probationary period." It is abundantly clear from this paragraph in Judge Wedekind's decision that he clearly understands Athens discipline policy. Judge Wedekind goes on to explain that safety and behavioral/performance violations remain on an employee's disciplinary record for 2 years, while only time/attendance violations are removed after 6 months. ALJD, at 21:34-40. In this context, Judge Wedekind's original statement that there is no 6-month "probationary" period is correct for two reasons: (1) Athens' does not have a 6-month "probationary" period, and (2) even if the look back period was considered a "probationary period" Judge Wedekind was obviously discussing Athens' safety discipline track. Thus, Bermudez' testimony that Leidelmeyer told him he would get a **6-month probationary period** for a **safety violation** was nonsensical. Judge Wedekind's decision here is well-reasoned and clear.

ii. The only discipline that Bermudez could have received for a safety violation after his final notice, based on Athens' progressive discipline policy, was a termination.

The Union next regurgitates an argument made by the General Counsel in its post-hearing brief, which was already fully and completely addressed by Judge Wedekind in his decision. UBX, at 8-9; ALJD, at 22:2 n.47.[13] Once again, the Union either failed to read the entirety of Judge Wedekind's opinion, possibly skipping over the footnotes, or more likely, they consciously

[13] The Union did not except to this claim in its list of exceptions and thus it should not be considered. Current NLRB Rules and Regulations § 102.46(a)(1)(ii) ("Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged will be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded.").

decided to make this frivolous argument. The Union states, "[t]he written disciplinary policy makes clear that the 'progressive discipline' system Athens maintains is not formal or binding, and that Athens may impose whatever level of discipline it sees fit under the circumstances." UBX, at 9. Judge Wedekind fully addressed this argument in detail at footnote 47. ALJD, at 22:2 n.47. It appears that the Union is trying to argue that Athens can give any type of discipline it wants regardless of the circumstances, which is a striking argument for a union to make. However, as Judge Wedekind pointed out, "the record indicates that this language was intended simply to clarify that the Company retained the option to bypass the initial steps depending on the nature and severity of the violation." ALJD, at 22:2 n.47. Human Resources Manager Lupita "Lupe" Ramirez Guerrero's ("Ramirez")[14] confirmed this, stating that a discipline could go beyond the next step (for example, jumping from a verbal discipline to termination) depending on the circumstances. Tr., 1572:18-1573:6 (Ramirez). However, even for a minor discipline, the next step in discipline will be given (a lessor or the same discipline cannot be given). Tr., 1573:7-17 (Ramirez). Accordingly, as already noted by Judge Wedekind, Athens could not have decided to randomly give Bermudez a 6-month probation for a safety violation. Tr., 1575:11-21, 1577:25-1578:3, 1580:9-13 (Ramirez), 1908:3-14, 1944:22-1945:6 (Naeole), 1998:12-15, 2010:23-2011:10, 2026:2-7 (Martinez).

Similar to the previous argument, the Union next claims Judge Wedekind erred "in discrediting Bermudez's testimony based on the fact that Bermudez had a final written warning on his record and so would have been terminated by Leidelmeyer if Leidelmeyer imposed discipline." UX, # 10(c). However, contrary to the Union's repetitive and unsupported arguments, as stated above, the uncontradicted record established that when an employee had a final written warning,

[14] The Union refers to Ramirez as "Guerrero" throughout their exceptions and brief. UX; UBX.

the next violation in the same discipline track would result in termination. ALJD, at 21:42-22:2 (citing GC Ex. 11; tr. 1572-1575, 1688-1689, 1716-1717, 1722-1724, 2011), 22:2 n.47; tr., 1575:11-21 (Ramirez), 1998:14-15 (Martinez). Accordingly, Judge Wedekind's analysis is well reasoned.

The Union further claims that Leidelmeyer did not testify that he was aware of Bermudez' discipline history at the time of the meeting. UBX, at 9. This is not persuasive as the Union presented no evidence to show that Leidelmeyer was not aware of Bermudez' past discipline at the time of the meeting. As noted above, Leidelmeyer was well aware of Bermudez' safety record. Tr., 2068:15-2069:10 (Leidelmeyer); 2010:24-2011:4 (Martinez). Moreover, Leidelmeyer testified that he took into account the fact that Bermudez "was on a final for safety" when considering whether to discipline Bermudez for this incident the next day. Tr., 2076:11-16 (Leidelmeyer). The Union makes one final attempt to salvage this argument by claiming that someone drafted a draft discipline for Bermudez on an unrelated behavioral issue (insubordination) after he had been issued a final warning. UBX, at 9; Er. Ex. 28 (6/2/18 incident). This does not prove anything as Bermudez was never given this "draft" discipline. Moreover, Bermudez was ultimately terminated for this behavioral issue, in line with the progressive discipline policy. GC Ex. 13.

Accordingly, Judge Wedekind correctly took into account Bermudez improbable testimony that he was told he was going to get a probation and a final written warning for a safety violation, despite the fact that there was no such thing as a disciplinary probation and he had already received a final warning for safety necessitating that his next safety violation would result in termination.

iii. Judge Wedekind correctly took into account that Bermudez was not disciplined for allegedly talking on his cell phone while driving in deciding Bermudez' credibility.

Lastly, the Union claims that Judge Wedekind "erred in discrediting Bermudez's testimony based on the fact that Bermudez was not ultimately disciplined." UX, # 10(d). Bermudez testified that he saw a discipline document sitting next to Leidelmeyer and that Leidelmeyer "was telling me that this was going to be the final warning, that I was going to be on six-month probation." Tr., 505:20-506:13 (Bermudez). As indicated above, the fact that Athens does not have a 6 month probationary period and does not have a 6 month look back period for safety violations, indicates that it is unlikely that this statement actually occurred or that this alleged document actually existed. Moreover, the fact that Bermudez was not disciplined goes to show that it is improbable that Leidelmeyer ever told Bermudez that he was going to be disciplined for the cell phone incident. ALJD, at 22:4-8. Clearly an administrative law judge can take inconsistencies and improbabilities into account when making credibility determinations based off of witness testimony, and the Union points to no case law stating that Judge Wedekind could not consider this discrepancy nor does the Union even make the argument that Judge Wedekind could not consider this inconsistency when considering Bermudez' credibility.

Accordingly, Judge Wedekind correctly took into account that Bermudez was not ultimately disciplined for the cell phone incident when considering credibility.

C. Judge Wedekind correctly took into account that it would be unusual for Bermudez not to mention to the Union an alleged conversation with Leidelmeyer regarding an anti-union petition for fear of retaliation but then told the Union about a similar alleged incident two months later.[15]

Judge Wedekind correctly found that it was troubling that Bermudez did not tell the Union that Leidelmeyer allegedly requested his help in decertifying the Union out of fear of retaliation in March,[16] and yet, he told the Union about another alleged incident regarding the decertification two months later in May. The Union's rhetoric regarding this credibility determination is not persuasive. UX, # 10(e); UBX, at 10. The Union attempts to make an argument that Bermudez was new to unions in March, which is why he did not bring up the alleged decertification conversation with Leidelmeyer at that time. UBX, at 10. Nonetheless, even if the Union's claim regarding why Bermudez did not mention this incident in March is to be believed, this does not explain why Bermudez failed to bring up this alleged March incident in May when he told the Union about this other alleged incident and had the Union read a statement he prepared about the alleged May incident. As detailed in Athens' Post-Hearing Brief, neither Bermudez nor the Union reported this March incident to Athens in May, even though they had ample opportunity to do so and in fact were explicitly invited, together with assured protection against retaliation, to provide any details regarding any other alleged incidents of concern. Athens' Post-Hearing Brief, at 151. Judge Wedekind correctly held that "if that conversation with Leidelmeyer had actually occurred, it would have been natural for Bermudez to mention it to the Union in connection with the May incident." ALJD, at 23:1-2; *see Spector Freight System, Inc.*, 141 NLRB 1110, 1123 n.27 (1963) (discrediting the charging party's explanation for his actions, in part, because he did not give this explanation for his actions when he was previously criticized for this behavior).

Accordingly, Judge Wedekind did not error in finding it inconsistent and troubling that Bermudez reported the May incident regarding a decertification petition to the Union, but failed

to do the same regarding an alleged conversation about decertifying the union with Leidelmeyer in March.

The Board should reject the Union's exceptions and should not overrule Judge Wedekind's decision as the clear preponderance of all the relevant evidence shows that Judge Wedekind's credibility resolutions regarding the alleged interrogation of Bermudez was not only not incorrect, but well founded in the record. The Union's Exception number 10 (and various sub-exceptions) should be dismissed as Judge Wedekind correctly held that Athens did not violate Section 8(a)(1) of the Act regarding an alleged interrogation of Bermudez.

IV. THE UNION'S EXCEPTION NUMBER 11 SHOULD BE DISMISSED AS JUDGE WEDEKIND CORRECTLY HELD THAT ATHENS DID NOT VIOLATE SECTION 8(A)(1) AND 8(A)(3) OF THE ACT WHEN IT TERMINATED BERMUDEZ FOR INSUBORDINATION.

A majority of the Union's exceptions regarding the termination of Bermudez, yet again, deal directly with Judge Wedekind's credibility resolutions. UX # 11(a)-(d). The Union continues its charade of ignoring relevant parts of the record or purposefully misstating Judge Wedekind's decision. UBX, at 16-19. As with Judge Wedekind's other credibility resolutions, the credibility resolutions should not be altered as the clear preponderance of all the relevant evidence does not indicate that the credibility resolutions are incorrect.

The Union's few exceptions that do not deal directly with credibility simply claim that Judge Wedekind either discounted relevant evidence or did not take into account specific evidence.

[15] In a footnote, the Union makes the claim that "the ALJ properly rejected Athens' argument that it was improbable that Leidelmeyer would have approached Bermudez about supporting the decertification petition. ALJD, at 23 n. 50." UBX, at 10. This is another falsification regarding Judge Wedekind's decision. While Judge Wedekind noted why Athens' argument may be incorrect, he ultimately decided not to make a final decision on this argument: "In any event, it is unnecessary to rely on the inherent improbability of Bermudez' account given the other substantial problems with that account discussed above." ALJD, at 23 n.50.

[16] Notably, Bermudez did not even raise these allegations when he was terminated in June 2018, rather they were only raised in August 2018, after the decertification petitions were filed.

UX # 11(e)-(f). However, as discussed below, Judge Wedekind properly weighed all the available evidence in making his determinations and the Union's arguments misrepresent Judge Wedekind's decision and the record. UBX, at 19-23.

A. Bermudez' Insubordinate Conduct on June 2, 2018.

As found by Judge Wedekind, on the morning of June 2, 2018, Field Supervisor Naeole gave Bermudez and other drivers their assignments and maps for the day. ALJD, at 23:14-15, 23:20-21. However, as this was the week following Memorial Day holiday and because the usual Friday routes had been moved to Saturday, it was likely that there would be more trash than usual. ALJD, at 23:15-18. This was notable as the Company can get cited and a truck could be impounded for being overweight during a road inspection and there are also safety concerns regarding overweight trucks. Tr., 1921:16-1923:22 (Naeole).

Several hours after receiving his assignment, Bermudez was about 90 percent through his route when he noticed that his truck was getting full and that he would probably not be able to finish the route. ALJD, at 24:4-5. Bermudez called Naeole on the two-way radio but Naeole's line was busy. ALJD, at 24:7-25:2. Naeole called him back a few minutes later and Bermudez told Naeole that he was on Huntington and Mackay, approaching Phelan, and that he probably would not be able to finish his route. ALJD, at 25:2-3. Naeole told Bermudez that he would send out another driver, Jacinto Pimentel, and that Bermudez would meet him at the corner of Huntington and Phelan and that they would switch their trucks. ALJD, at 25:3-6. Naeole made it clear that Bermudez was to wait at that specific cross-street and not continue on his route any further. Tr., 1937:5-10, 1938:17:20 (Naeole). Naeole also spoke with Pimentel and told him about the truck switch with Bermudez. ALJD, at 25:7-8.

However, when Bermudez reached Phelan, Bermudez disregarded Naeole's instructions and continued onward. ALJD, at 25:10-11. When Pimentel arrived Bermudez had already passed

the meeting point so he pulled up behind Bermudez' truck. ALJD, at 25:11-12. Naeole called and asked him if he and Pimentel had switched trucks as directed. ALJD, at 26:4. Bermudez replied that he had not because his truck was still packing and he thought it would save them time and allow them to finish quicker. ALJD, at 26:4-5. Naeole then realized that Bermudez had continued to collect trash beyond the Phelan cross-street instead of stopping and switching trucks with Pimentel as instructed. ALJD, at 26:6-7. Naeole viewed this failure to switch trucks at the specified location to be insubordination. ALJD, at 26:19-20; tr. 1942:3-4, 1943:11-13 (Naeole). This resulted in Bermudez' truck being substantially overweight. ALJD, at 26:26-27.

Naeole called Operations Manager Martinez and explained to him what had happened. ALJD, at 26:19-20. Specifically, Naeole told Martinez that Bermudez had been insubordinate by not doing a truck switch with Pimentel at the cross-street as instructed. ALJD, at 26:20-21 Martinez then informed Leidelmeyer of the matter on Monday morning, which then began an extensive investigation that resulted in Bermudez' termination for insubordination. ALJD, at 26-28.

B. The Union's Exceptions to Judge Wedekind's Credibility Resolutions Regarding the Termination of Bermudez Should be Dismissed.

i. Judge Wedekind properly determined that Kam Naeole's testimony regarding a two-way radio call with Bermudez was more credible than Bermudez' testimony.

The Union first argues that Judge Wedekind "erred by crediting supervisor Kam Naeole's account of what he told Bermudez during a two-way radio call over Bermudez's account of that call." UX, # 11(a). The Union's main argument here is that Judge Wedekind discredited other parts of Naeole's testimony. "However, 'nothing is more common in all kinds of judicial decisions than to believe some and not all' of a witness' testimony." *Daikichi Corp.* 335 NLRB 622, 622 (2001) (citing *NLRB v. Uni-versal Camera Corp.,* 179 F.2d 749, 754 (2d Cir. 1950), revd. on other

grounds 340 U.S. 474 (1951); accord *General Fabrications Corp.,* 328 NLRB 1114 fn. 1 (1999), enfd. 222 F.3d 218 (6th Cir. 2000)). The Union's argument that Judge Wedekind could not credit Naeole's testimony regarding a two-way radio call over Bermudez' account simply because at other times Judge Wedekind did not credit Naeole's testimony is contradicted by established Board case law. *General Fabrications Corp.,* 328 NLRB at 1114 n.1 (1999) ("The Respondent also contends, inter alia, that the judge improperly credited one part, but discredited another part, of employee Gerald Rahm's testimony. We note, however, that nothing is more common in all kinds of judicial decisions than to believe some and not all of a witness' testimony.") (internal citation and quotations admitted). However, as the Union concluded "on the key question of whether Naeole had, in fact, instructed Bermudez to do a 'truck switch' . . . the ALJ credited Naeole's testimony over Bermudez's." UBX, at 16 (citing ALJD, at 25 n.52). This is accurate and a completely logical and reasonable decision by Judge Wedekind, which is clearly supported by Board case law and should not be disturbed.

ii. Jacinto Pimentel's written statement corroborated Naeole's testimony.

The Union next argues that Judge Wedekind "erred by characterizing driver Jacinto Pimental's June 7 written statement as 'corroborating' Naeole's account of the call." UX, # 11(b). The Union continues to try to manipulate Judge Wedekind's analysis in order to undermine him. Judge Wedekind fully and appropriately weighed this evidence:

> Pimental himself confirmed orally to Leidelmeyer on June 2 and again in writing on June 7 that Naeole directed him to switch trucks with Bermudez at Huntington and Phelan. While this was not conclusive proof that Naeole told Bermudez the same thing, it was corroborative of Naeole's assertion that he did so.

ALJD, at 31:7-10. As Judge Wedekind noted, Jacinto Pimentel ("Pimentel")[17] confirming that Naeole told him to switch trucks with Bermudez does not necessarily mean for certain that Naeole told Bermudez to switch trucks as well; however, as Judge Wedekind pointed out, this does make it more likely that it did occur. Judge Wedekind rightly considered this part of the record, together with other corroborating evidence (discussed below), when making his credibility determinations. The Union did not provide any citation to case law stating that an administrative law judge could not take this into consideration.[18]

iii. Judge Wedekind properly took into account the entirety of the record when weighing Bermudez' allegations, including Luis Prado's lack of neutrality.

The Union next claims that Judge Wedekind "erred in discrediting helper Luis Prado's testimony because Prado 'was a union supporter.'" UX, # 11(d). This allegation is not only incomplete but also ignores the bigger picture. The Union claims that Judge Wedekind did not discredit any Athens managers because they are Athens supporters. UBX, at 18. However, obviously Judge Wedekind is aware of the fact that any witness with a stake in the game is not a neutral witness. Whether that is a witness for the employer or a witness for the Union. Here, Judge Wedekind is simply pointing out that Luis Prado ("Prado") "was not an entirely" neutral witness, because he was a union supporter and because he had been previously discharged from the Company for being in the yard without a safety vest. ALJD, at 25 n.53. The Union does not

[17] While various parties have referred to Jacinto Pimentel as "Pimental," his written statement shows that the correct spelling of his name is "Pimentel." GC Ex. 30.

[18] The Union also argues that Pimentel's statement does not corroborate Naeole's testimony because other witnesses stated that Pimentel did not want to switch trucks with Bermudez. UBX, at 17. The Union did not except to this point in its list of exceptions; therefore, it should not be considered. Current NLRB Rules and Regulations § 102.46(a)(1)(ii) ("Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged will be deemed to have been waived."). Regardless, this argument is nonsensical. Whether Pimentel wanted to switch trucks does not have any impact on whether Naeole told Bermudez to switch trucks. More importantly, these statements do not change the fact that Bermudez, on his own, drove past the intersection where he was supposed to stop and wait for Pimentel and continued to pick up trash, in direct insubordination of his supervisor.

cite any authority stating that an administrative judge cannot take into account the interests or the neutralities of the witnesses. Moreover, in reviewing Judge Wedekind's entire decision, it is clear that Judge Wedekind did not simply fully discredit Prado because he was a Union supporter, as the Union implies. In fact, Prado's testimony was credited on other accounts. For example, Judge Wedekind noted that Prado confirmed that Naeole told Pimentel to do a truck switch with Bermudez, and thus Judge Wedekind took that into consideration. ALJD, at 25 n.52; tr., 707:3-14 (Prado).

Additionally, the Union ignores the bigger picture. At this point in his opinion, Judge Wedekind was taking the entirety of the relevant record into account in considering whether Bermudez' testimony that Pimentel was the one who suggested they not switch trucks, including the fact that "Bermudez did not mention this to Naeole on June 2, in his subsequent June 7 written statement, or during the investigatory interview with Leidelmeyer the same day." ALJD, at 25 n.53 (citing tr. 1987; GC Exhibits. 6 and 31); *see Spector Freight System, Inc.*, 141 NLRB at 1123 n.27 (1963) (discrediting the charging party's explanation for his actions, in part, because he did not give this explanation for his actions when he was previously criticized by his managers for this behavior). The fact that Prado was not a neutral witness was one minor, relevant fact that Judge Wedekind properly took into account in making his credibility determination of Bermudez' testimony.

iv. Judge Wedekind properly discredited Bermudez for testifying about an excuse for his insubordination that he had not previously brought up, despite having multiple opportunities.

The Union makes the false claim that Judge Wedekind "erred in discrediting Bermudez's testimony based on the fact that Bermudez did not blame the failure to switch trucks on Pimentel during this disciplinary interviews." UX, # 11(d). The Union tries sleight of hand here by arguing that it was Athens' managers' fault for not confronting Bermudez with Pimentel's accusation that

Bermudez was to blame for not switching trucks. UBX, at 18. The Union does not cite to the record to support this claim. UBX, at 18. Nonetheless, regardless of whether or not Bermudez was confronted with the statement of Pimentel, Judge Wedekind is simply pointing out that Bermudez credibility as a witness was diminished by the fact that he testified to a possibly crucial fact that he never brought up beforehand. *See Spector Freight System, Inc.*, 141 NLRB at 1123 n.27 (1963) (discrediting the charging party's explanation for his actions, in part, because he did not give this explanation for his actions when he was previously criticized for this behavior). Judge Wedekind correctly noted that this was a "striking omission" and goes to show that the facts recounted by Bermudez in his testimony regarding this specific fact are improbable. ALJD, at 25 n.53.

The arguments made by the Union regarding Judge Wedekind's credibility determinations concerning the termination of Bermudez are unfounded in the record. On the other hand, Judge Wedekind's credibility resolutions here are thorough and correctly done. Accordingly, Judge Wedekind's credibility resolutions should not be altered as the clear preponderance of all the relevant evidence does not indicate that the credibility resolutions are incorrect.

C. The Union's Exceptions are Not Supported by the Record and do not Establish the Necessary Elements under a Wright Line Analysis.

At the outset, the Union argued that Judge Wedekind "did not make a clear finding on whether anti-union animus was a motivating factor in Athens' termination of Bermudez." UBX, at 19. This is blatantly false. Judge Wedekind directly states: "The General Counsel also argues that there are a number of other, circumstantial factors indicating that the Company had union animus and a discriminatory motive. As discussed below, however, they are likewise insufficient, either individually or in combination, to carry the burden of proof." ALJD, at 30:4-7. Moreover, Judge Wedekind thoroughly discussed and *rejected* every argument that the General Counsel and

the Union put forward to establish animus regarding the termination of Bermudez. ALJD, at 29-31. Judge Wedekind concluded by stating: "In any event, even assuming arguendo there is sufficient evidence that Bermudez' union activities were a motivating factor in his termination, the Company established that it would have terminated him regardless." ALJD, at 31:32-34. Accordingly, Judge Wedekind rejected these allegations against Athens because the General Counsel and the Union failed to prove union animus as required by *Wright Line*, and even if the Union had establish union animus, Athens met its burden under *Wright Line* by establishing that it would have terminated Bermudez regardless of his union activities.[19]

i. Judge Wedekind correctly rejected Bermudez' uncorroborated testimony that Naeole and Leidelmeyer made sarcastic comments to him regarding his Union activity.

The Union next argues that Judge Wedekind "erred in discounting the direct evidence of anti-union animus in the sarcastic comments made by Leidelmeyer and Naeole to Bermudez." UX, # 11(e). The Union states in their brief that Naeole mockingly called Bermudez a "superstar" and that Leidelmeyer called Bermudez a "stupid shop steward." UBX, at 20. However, the Union wrongly asserted that neither Leidelmeyer nor Naeole disputed that they had made sarcastic comments towards Bermudez about this support for the union. UBX, at 20. While they were not directly confronted by Bermudez' self-serving testimony, both Leidelmeyer and Naeole expressly

[19] Under *Wright Line*, in order to prove a violation of the Act under Section 8(a)(3) and (1), the General Counsel has the initial burden to prove by a preponderance of the evidence that the employee's alleged union or protected activity was a motivating factor in the employer's decision to discipline him. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Bridgestone Firestone South Carolina*, 350 NLRB 526, 529 (2007); *United Rentals*, 350 NLRB 951, 951 (2007); *Merck, Sharp & Dohme Corp.*, 367 NLRB No. 122, at 3 (2019). The elements required to show this initial burden are "(1) union or protected concerted activity, (2) employer knowledge of that activity, and (3) union animus on the part of the employer." *Merck, Sharp & Dohme Corp.*, 367 NLRB No. 122, at 3 (citations omitted); *Bridgestone Firestone South Carolina*, 350 NLRB at 529 (citations omitted). Only if the General Counsel is able to meet its burden, then "the burden of persuasion shifts to the employer to show that it would have taken the same adverse action even in the absence of the protected activity." *United Rentals*, 350 NLRB at 951; *Electrolux Home Products*, 368 NLRB No. 34, at 3 (2019) (citing *Wright Line*, 251 NLRB at 1089; also citing *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), enfd. mem. 127 F.3d 34 (5th Cir. 1997)).

stated that they have remained neutral toward the Union and not expressed their opinions about the Union to any employees. Tr., 1902:9-20 (Naeole), 2066:8-10 (Leidelmeyer). This testimony directly refutes the idea that they would make disparaging comments to Bermudez about this union activity.

In regards to the superstar comment, Bermudez failed to provide any context to show that it was a negative comment, if actually made. He claimed that "I would just randomly be walking to clock out" and Naeole would say "whats up superstar?" Tr., 684:22-23 (Bermudez). However, when asked if Naeole explained what he was referring to, Bermudez testified: "No. I never got along – I don't get along with people like that, so no." Tr., 684:24-685:2 (Bermudez). Thus, Bermudez' own testimony fails to indicate that an alleged superstar comment had anything to do with him being a part of the Union, let alone indicated animus.

Regarding the alleged "stupid union steward" comment, as Judge Wedekind correctly pointed out: "Bermudez testified only that Leidelmeyer made the statement to him while he was outside the dispatch area with Naeole. He could not recall how the conversation started or provide any other details about it." ALJD, at 29:44-30:2 (citing tr., 681-688); tr. 687:21-688:1 (Bermudez). Not only does this make Bermudez' testimony improbable but as Judge Wedekind correctly noted: "Board precedent indicates that such comments **may** indicate animus **under certain circumstances**," but that requires a detailed factual analysis. ALJD, at 29:34-35 (emphasis added). For example, in *Spector Freight System, Inc.*, a case Judge Wedekind described as "finding that a manager's sarcastic and disparaging comments did not establish the employer's animus and a discriminatory motive under the circumstances," the administrative law judge went through a detailed factual analysis regarding the circumstances. 141 NLRB 1110, 1125 (1963);

ALJD, at 29:42-43. Accordingly, allegations of disparaging comments, without any detail regarding the surrounding circumstances, cannot prove animus.

The Union makes the cursory claim, without any analysis, that "the testimony [here] was precisely as detailed as the testimony in *Harvey's Resort Hotel*, 234 NLRB 152." However, a more detailed review of the factual circumstances and testimony in *Harvey's Resort Hotel*, calls for the opposite conclusion. *Harvey's Resort Hotel*, 234 NLRB 152 (1978). In that case, there were allegations regarding the specific date, place, and context of multiple disparaging comments made to a shop steward the day he became a shop steward and the weeks following. *Id.* at 152, 1567-57. Most importantly, as the Board directly stated, the testimony regarding the disparaging comments was "credited testimony" by the administrative law judge. *Id.* at 152, 157. In the case at hand, Bermudez did not provide a date of the interactions or any context other than the incident occurred by "a wood bench outside the dispatch area." Tr., 687:21-22 (Bermudez). Notably, Bermudez provided no detail which could be used to understand the actual context of the alleged statement in terms of what may have prompted it or what it referred to, much less sufficient detail to establish the veracity of the allegation. As such, it is clear from Judge Wedekind's opinion that he did not credit this testimony as Bermudez failed to describe the circumstances in which these alleged disparaging comments occurred. ALJD, at 29:43-44 ("However, Bermudez failed to describe the circumstances.").

Accordingly, Judge Wedekind correctly discounted Bermudez' testimony that Naeole and Leidelmeyer made disparaging comments about his union activity.[20]

[20] At this point, the Union attempts to make an additional argument on the timing of the adverse action. UBX, at 20-21. However, the Union did not except to this claim in its list of exceptions and thus it should not be considered. UX; Current NLRB Rules and Regulations § 102.46(a)(1)(ii) ("Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged will be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded."). Regardless, by the time Bermudez was terminated, he had been on the bargaining committee for six months, and there is no claim that Bermudez was disciplined for his union activities prior to his termination. Jt. Ex. 62. Indeed, if Athens had wanted to terminate Bermudez for his union

ii. Unlike Bermudez, Pimentel did not commit an insubordinate act.

The Union's next exception states that Judge Wedekind "erred in failing to take into consideration the recovered evidence that Athens issued no discipline at all to Pimental, despite the fact that Pimental violated a direct instruction from Naeole to switch trucks." UX, # 11(f). At the outset, the Union claims that "Pimental never received any discipline—not even a verbal warning or counseling—and was never put under any kind of disciplinary investigation." UBX, at 22. However, the Union has provided no evidence to back up this claim. In fact, the Union did not provide any citation to the record here. *Id.* This is because neither the General Counsel nor the Union attempted to elucidate such evidence.

Moreover, Pimentel did not switch trucks because Bermudez refused to do so, and obviously, Pimentel could not force Bermudez to switch with him. GC Ex. 30; Tr., 1983:9-24 (Naeole). In fact, as noted above, Bermudez disregarded the instruction to stop at the appointed switch location and therefore was not there when Pimentel arrived to do the truck swap. Although Prado testified that Pimentel was complaining he did not want to switch trucks before they arrived at Bermudez' location, Prado did not hear Bermudez or Pimentel discuss the truck swap when they arrived at the location, and there is no evidence that Pimentel, in fact, refused to switch trucks with Bermudez. Tr., 711:24-712:4 (Prado). To the contrary, Pimentel's written statement proves it was

activity, it could have easily done so in March when a supervisor reported that he observed Bermudez talking on his cell phone while driving. Leidelmeyer could have easily just taken the word of a supervisor over Bermudez' and disregarded Bermudez' explanation for what the supervisor saw, but he choose not to. This is powerful persuasive proof that Athens had no animus and Bermudez' union activities had nothing to do with his termination. Moreover, as Judge Wedekind correctly held, "there is no direct or compelling circumstantial evidence that Naeole, Martinez, or Leidelmeyer, who were initially involved and forwarded the disciplinary matter to Torres, knew about Bermudez' allegation" at a May 30th bargaining session. ALJD, at 30:11-13. Naeole, Martinez, and Leidelmeyer denied knowing anything about it, Vice President of Operations Cesar Torres and HR Vice President Michael Pompay denied telling any of them, and Bermudez testified that Naeole, Martinez, and Leidelmeyer never mentioned the statement to him. ALJD, at 30:13-18; tr., 1985:25-1986:10 (Naeole), 2035:1-13 (Martinez), 2091:18-22 (Leidelmeyer), 2142:1-2143:6 (Torres), 2438:5-2442:5 (Pompay), 672:6-673:3 (Bermudez). Finally, as explained above, Athens had no choice but to terminate Bermudez as he already had a last and final in the same disciplinary track. ALJD, at 30:18-22; GC Ex. 10; GC Ex. 13; tr., 1580:9-13 (Ramirez), 1944:22-1945:6 (Naeole).

Bermudez, not Pimentel, who refused to switch trucks. GC Ex. 30. Moreover, Pimentel would not be expected to argue or confront Bermudez, a co-worker, in order to force Bermudez to follow his supervisor's directive and switch trucks after Bermudez specifically declined to do so. Tr., 1984:6-1985:1 (Naeole).

More importantly, Pimentel and Bermudez did not commit the same act. As Judge Wedekind stated, the termination notice provided that "Bermudez disregarded Naeole's directive and continued on his route, which resulted in his truck being grossly overweight." ALJD, at 30:33-35; GC Ex. 13. This is why Bermudez was disciplined. Tr., 2103:4-10 (Leidelmeyer) ("The insubordination dealt with the fact that [Bermudez] was given specific instructions to swap out his truck at a specific location, via the exchange between he and another Athens driver, at which point he decided, on his own, to circumvent [sic] the instruction from his supervisor and continue on his route, which ended up being grossly overweight truck."), 1981:8-12 (Naeole). Pimentel did not commit the same act.

Additionally, no evidence has been presented to establish that there were other employees who in the past, or since, were treated differently than Bermudez under similar circumstances. In fact, the opposite is true, the unrefuted testimony of multiple witnesses confirmed that under Athens' policy and practice termination was the only and necessary result because of Bermudez' disciplinary history. Tr., 1575:11-21, 1577:25-1578:3, 1580:9-13 (Ramirez), 1908:3-14, 1944:22-1945:6 (Naeole), 1998:12-15, 2010:23-2011:10, 2026:2-7 (Martinez).

iii. Athens engaged in an extensive and thorough investigation into Bermudez insubordination, including notifying the Union ahead of time and interviewing Bermudez.

The Union's claim that Athens engaged in a "cursory investigation" is utterly ridiculous. The Union first states that Judge Wedekind failed "to take into consideration the cursory investigation th[at] Leidelmeyer conducted of the incident." UX, # 11(g). This is blatantly

incorrect. Judge Wedekind included a detailed factual description and analysis on the investigation, which was anything but cursory. ALJD, at 26:19-28:42, 31:1-15.

The Union again attempts to distort the record by claiming "Leidelmeyer's anti-union animus was demonstrated by his failure to interview Bermudez before reaching the conclusion that he should be terminated for insubordination." UBX, at 22; UX, # 11(g). This is both a false statement of the record and of Judge Wedekind's decision. Judge Wedekind found that Leidelmeyer had spoken to multiple people about the incident, reviewed Naeole's written statement, and spoke to Pimentel on the phone and thus "Leidelmeyer concluded that Bermudez should be terminated. *However* . . . ." ALJD, at 26:19-27:8; tr. 1943:16-1945:6 (Naeole), 2022:2-2024:12 (Martinez), 2079:12-2082:5 (Leidelmeyer). Even at this point, this was not a cursory investigation; but, more importantly, it is clear that this was not the end of the investigation or the ultimate decision on termination. In fact, as Judge Wedekind thoroughly detailed in his decision, Leidelmeyer took many more steps before ultimately deciding, along with Vice President of Operations Cesar Torres, to terminate Bermudez. ALJD, at 27:9-28:42; tr., 2088:11-18 (Leidelmeyer).

After the initial steps in the investigation, Leidelmeyer conferred with Torres. Tr., 2029:1-6 (Martinez). In fact, Leidelmeyer testified that he "brought the information to [Torres'] attention and asked for guidance and direction." Tr., 2082:11-12 (Leidelmeyer). Torres was provided with the dump receipt, Naeole's written statement, and Bermudez' substantial prior disciplinary notices. ALJD, at 27:8-14; tr. 2084:4-10 (Leidelmeyer); Er. Ex. 27; GC Ex. 5; Er. Ex. 28. Torres then decided to inform the Union about the matter and schedule an investigatory meeting with Bermudez. ALJD, at 27:16-23.[21] A meeting was held with Bermudez on June 7, which included

[21] Athens informed the Union that given Bermudez' disciplinary history and the nature of the incident, should the investigation confirm the insubordination, it did not see any choice but to terminate Bermudez, but that it invited the

Leidelmeyer, Martinez, HR Generalist Elsa Alvarez ("Alvarez"), Bermudez, and a Union Business Representative. ALJD, at 27:25-32; tr., 537:23-538:11 (Bermudez), 2029:23-25 (Martinez), 2084:202085:2 (Leidelmeyer); GC Ex. 31. At the beginning of the meeting, "*Leidelmeyer said they were there to get Bermudez' account of what happened*." ALJD, at 27:27-28; tr., 538:17-18 (Bermudez). The group had a detailed discussion about the incident and Bermudez provided a written statement that he had prepared beforehand. ALJD, at 27:25-28:8; tr. 542:21-543:6 (Bermudez), 2030:1-18 (Martinez), 2085:3-2088:1 (Leidelmeyer); GC Ex. 6. At the end of the meeting, Leidelmeyer "told Bermudez he would be suspended *pending further investigation*." ALJD, at 28:7-8; tr., 547:7-9 (Bermudez), 2031:1-9 (Martinez); GC Ex. 31.

Leidelmeyer met with Torres the following day. Tr., 2032:3-9 (Martinez), 2088:3-18 (Leidelmeyer). After providing Torres with the information from the previous days meeting and Pimentel's written statement, "*they then discussed whether Bermudez should be terminated* for insubordination in light of his previous final written warnings." ALJD, at 28:17-19; tr., 2088:3-18 (Leidelmeyer), 2214:16-2215:7 (Torres); GC Ex. 30. Only at this point, after an extensive investigation that included a meeting with Bermudez, did they finally decide that Bermudez should be terminated. ALJD, at 28:19-21; tr., 2088:11-18 (Leidelmeyer); GC Ex. 31; GC Ex. 13.

Regardless of whether Leidelmeyer thought that Bermudez should be terminated after reviewing Bermudez' dump receipt and speaking to both Naeole and Pimentel, he did not make the decision then but continued to extensively investigate the issue. This included letting the Union

Union to provide any reason or basis they should not terminate him, stating it would give the Union through the end of the week to do so. Tr., 2250:14-2251:5 (Abrahms); 2136:18-2137:21 (Torres). Other than general statements during the June 7 investigatory meeting with Bermudez, the Union did not provide any reason or basis why Bermudez should not be terminated, nor did the Union otherwise respond to Athens' invitation to weigh in by the end of the week. Accordingly, on Monday June 11, Abrahms called the Union President, Phillips, and told him given the circumstances Athens planned to terminate Bermudez, to which Phillips responded "ok". Tr., 2251:6-2252:7 (Abrahms).

know about the situation, conducting an investigatory interview with Bermudez where he was able to give his account of what happened and provide a written statement, meeting with Cesar Torres multiple times, and ultimately deciding together with Torres to terminate Bermudez after he exhausted all avenues of information. This was not a cursory investigation and a final decision was not made before Bermudez could be interviewed. Moreover, the decision was not effectuated until after the reasons were pre-shared with the Union and the Union President acquiesced and said "ok." Tr., 2251:6-2252:7 (Abrahms).

The Union completely and blatantly misstates Judge Wedekind's opinion: "But the ALJ recognized that Leidelmeyer had already reached a conclusion on discipline, and Torres did not participate in the June 7 meeting and Leidelmeyer remained the decision maker on Bermudez's termination." UBX, at 22. Judge Wedekind did not state that Leidelmeyer had already reached a final conclusion on discipline but detailed the many steps Leidelmeyer took to fully investigate the situation, including: holding a meeting with Bermudez "*to get Bermudez' account of what happened*," placing Bermudez on an investigatory suspension after the meeting "*pending further investigation*," and then "*[t]hey[, Leidelmeyer and Torres,] then discussed whether Bermudez should be terminated for insubordination*." ALJD, at 27:27-28, 28:7-8, 28:16-18. The Union's statements here are easily contradicted by the record and again brings to mind whether the Union simply did not take the time to carefully review Judge Wedekind's decision or if it is purposefully misleading the Board in its brief. Either way, the Board should reject these exceptions as unsupported by the record.

iv. The General Counsel and the Union failed to establish disparate disciplinary treatment.

The Union regurgitates its previous argument and claims that Judge Wedekind "erred [in] failing to address the record evidence that Athens failed to discipline Pimental for identical conduct

in concluding that Athens had met its burden under the *Wright Line* standard." UX, # 11(h). As detailed above, Pimentel did not switch trucks because Bermudez refused to do so, and Pimentel, as a co-worker of Bermudez, would not be expected to, and in fact would be discouraged from, trying to force Bermudez to switch trucks. Moreover, Bermudez was disciplined as he disregarded Naeole's directive to stop at a specific location to switch trucks and continued on his route, which resulted in his truck being grossly overweight. Contrary to the Union's claim, Pimentel did not commit this "identical conduct." Additionally, the Union has not provided a single citation to the record that shows that Pimentel was not disciplined.

Thus, Judge Wedekind correctly held that "there is no substantial record evidence that the Company had not disciplined employees who were known by management to have committed such prohibited conduct in the past." ALJD, at 31:37-32:2.

Accordingly, the Union's Exception Number 11 (and various sub-exceptions) should be denied as Judge Wedekind Correctly held that Athens did not violate Section 8(a)(1) and 8(a)(3) of the Act when it terminated Bermudez for insubordination.

V. THE UNION'S EXCEPTION NUMBER 12 SHOULD BE DISMISSED AS JUDGE WEDEKIND CORRECTLY HELD THAT ATHENS DID NOT VIOLATE SECTION 8(A)(1) OR 8(A)(3) OF THE ACT BY DISCIPLINING DAMIEN WEICKS.

The Union's final set of exceptions challenge Judge Wedekind's dismissal of the allegations that Weicks' April 2018 written warning violated Section 8(a)(1) and 8(a)(3) — allegations that incidentally were filed on August 22, 2018, in the Union's second charge (31-CA-226550) after all initial blocking allegations related to the Sun Valley yard failed. Despite all of the Union's creative arguments regarding the allegations involving Weicks,[22] Weicks admitted, on the stand and under oath, that he committed the act he was disciplined for: creating a hostile work

[22] Weicks is a bin painter at the Sun Valley Yard.

environment by making the disrespectful statement that he would not talk to his co-workers because they were "below" or "beneath" him. Moreover, it was established that Athens would have given Weicks the same low-level discipline for his statement even in the absence of his Union activity and even if it had been credited that his co-workers had cussed at him prior to him making this statement.

Once again the entirety of the Union's exceptions are based on Judge Wedekind's credibility resolutions or misstatements regarding Judge Wedekind's findings. UX # 12(a)-(h). These exceptions are easily countered by the record as a whole. As detailed above, the Board has a long established policy that it will not overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that the credibility resolutions are incorrect. *See Supra* Section I. (Garcia). Additionally, the Union once again incorrectly claims that Judge Wedekind "did not base his credibility determination on demeanor, only on facts discernable from the record." UBX, at 27 n.5. As explained above, this is false, Judge Wedekind considered demeanor as well as a multitude of other factors to determine the credibility of the witnesses. *See Supra* Section I. (Garcia); ALJD, at 3 n.9.

A. Judge Wedekind correctly discredited the testimony of Brendan Farris as there were multiple problems with Brendan Farris' testimony.

The Union generally excepted to Judge Wedekind's findings that Brendan Farris' ("Farris") testimony should be discredited, and also specifically that he was discredited "on the mere fact that a different witness disagreed with [his testimony]," "that Farris had a 'prior

friendship' with Weicks," and that "he had been discharged by Athens." UX, # 12(a)-(d).[23] All of these exceptions can be quickly refuted by the record.

The Union claims that Judge Wedekind erred in discrediting Farris' testimony because a different witness disagreed with his testimony. UX, # 12(b). This claim is, at best, an over simplification of the Judge's findings. Judge Wedekind discredited Farris for various reasons; however, even if he did discredit Farris based on Human Resources Manager Ramirez' contrary testimony, this would not have been in error. *Diamond Electric Manufacturing Corporation*, 346 NLRB 857, 857 n.2 (2006) ("We have carefully examined the record and find no basis for reversing the [credibility] findings. In affirming the judge's credibility determinations . . . . We rely, instead, on the judge's crediting of other witnesses over [the line supervisor] and his overall assessment of the demeanor of the witnesses."). Moreover, it is implicit in Judge Wedekind's decision that he believed Ramirez' testimony was more credible than Farris' testimony regarding whether a meeting about Weicks ever occurred between Ramirez and Farris. This is obviously a finding based off of demeanor, which as discussed above, is something that Judge Wedekind correctly considered in determining the credibility of each witness. Moreover, Judge Wedekind discusses Farris' suspect claims and then immediately after discusses Ramirez' contrary claims and why Farris is not a believable witness. ALJD, at 35:11-29. It is clear that Judge Wedekind considered Ramirez to be a credible witness as he gave her account of the facts more weight and stated that her account was "more consistent with the record as a whole" when compared to Weicks. ALJD, at 35 n.65.[24]

[23] Farris was a former welder at the Sun Valley Yard.

[24] The Union briefly adds in their brief that "the ALJ stated that Farris's testimony was not corroborated by any other direct or indirect evidence" and then asserts that Ramirez' "testimony was not corroborated by any direct or indirect evidence either." UBX, at 27-28. The Union did not except to this claim in its list of exceptions and thus it should not be considered. Current NLRB Rules and Regulations § 102.46(a)(1)(ii) ("Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged will be deemed to have been waived. Any exception

The Union further claims that Judged Wedekind erred "in concluding that Farris had a 'prior friendship' with Weicks, a conclusion not supported by the record." UX, # 12(c); UBX, at 27-28. The arguments made by the Union in this section of their brief show that, once again, the Union is either blissfully ignorant to the entirety of Judge Wedekind's decision or the Union is specifically selecting parts of his decision while ignoring other relevant sections in hopes of deceiving the Board.

For example, the Union selectively chose to quote Judge Wedekind as saying "prior friendship" and ignore the fact that twice in the proceeding sentences Judge Wedekind made it clear that he considered Farris and Weicks to be "work friends." ALJD, at 35:14, 35:26-27. Additionally, the Union argues that Judge Wedekind's findings are incorrect because Judge Wedekind's "characterization [of the relationship] does not accurately reflect the record in which Farris testified only that he 'sometimes' had lunch with Weicks." UBX, at 28. This is an interesting argument as Judge Wedekind stated this exact same fact in his opinion: "[Farris] was a work friend of Weicks and they sometimes ate lunch together." ALJD, at 35:14-15. Furthermore, the Union argues that "Farris stated that he was closer to Weicks tha[n] 'most' of the others in the yard, but there was no testimony that he and Weicks were friends outside of work." UBX, at 28. Again, Judge Wedekind made no such claim, but clearly stated that Farris and Weicks were "work friends", and correctly took that into account when considering Farris' credibility. Accordingly, the arguments that the Union have made to attempt to establish that Judge Wedekind mischaracterized the relationship of Farris and Weicks are plainly wrong and his conclusions are fully supported by the record.

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which fails to comply with the foregoing requirements may be disregarded."). Nonetheless, the Union and the General Counsel did not put forward any evidence against Ramirez to show that she was biased or lacked credibility. While, as Judge Wedekind noted in his decision, there were ample reasons to doubt the credibility of Farris.

The Union also claims that Judge Wedekind erred in discrediting Farris "based on the fact that he had been discharged by Athens more than a year earlier." UX, # 12(d). This is once again a misstatement by the Union as Judge Wedekind simply took into account that Farris was "not an entirely disinterested witness" given "both his prior friendship with Weicks and his prior termination from the Company." ALJD, at 35:27-28. The Union makes the claim, without citing any authority, that a previous discharge should not be taken into account for credibility determinations because this would mean all Section "8(a)(3) discriminatees would always begin with their testimony discredited." UBX, at 28. Of course, this is a straw man argument, as it is obvious that there is a difference between an employee who is testifying about an alleged 8(a)(3) discrimination regarding their own termination, from a witness, like Farris, who was previously terminated for performance related reasons and is now testifying for the Union against the company who terminated him. Thus, it was reasonable for Judge Wedekind to take this into account when deciding Farris' credibility.

The Union makes the unsupported claim that "Farris's testimony was important because it demonstrated that [Ramirez] considered Weick[s] to be causing a 'hostile work environment' at the facility with his union activity, and Weick[s] was ultimately disciplined for creating a 'hostile work environment.'" UX, at 28. This is simply not true. As thoroughly explained in Athens' Post-Hearing Brief, even if a meeting did occur, based on the testimony of Farris, the meeting was only in regards to whether Weicks was promoting the Union while people were working. Athens' Post-Hearing Brief, 72-73; tr., 609:10-610:2 (Farris). This would be a violation of both workplace rules and the Labor Peace Agreement, and thus Ramirez would be permitted to conduct a lawful investigation regarding such accusations. *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 158-59 (2014); *St. Francis Regional Medical Center*, 363 NLRB No. 69, fn. 2 (2015).

Accordingly, even if this alleged meeting occurred, which it did not, it would not establish the union animus the Union is seeking to imply here as it would have been a lawfully conducted investigation. This would be totally separate and distinct from the actual incident where Weicks was correctly punished for creating a hostile work environment by making a disrespectful and degrading comment to his fellow co-workers; any alleged prior meeting does not change this fact.

Accordingly, Judge Wedekind correctly discredited the testimony of Farris.

B. Judge Wedekind properly took into account the testimony of employee Julio Porres.

The Union next attempts to twist the testimony of employee Julio Porres'[25] in order to support their farcical claims. Notably, the Union does not provide any citation to the record to support this exception. UBX, at 29. Thus, this allegation should be rejected as the Union failed to "provide precise citations of the portions of the record relied on," as required by Current NLRB Rules and Regulations. Current NLRB Rules and Regulations § 102.46(a)(1)(i)(C), (a)(1)(ii) ("Any exception which fails to comply with the foregoing requirements may be disregarded.").

The Union's first exception regarding Porres states that Judge Wedekind failed "to take into account the testimony of Athens witness Julio Por[r]es, which corroborated Weicks' testimony that there had been a verbal altercation between him and bin [washers] [26] Lozano and Zelaya." UX, # 12(e). This claim is already on shaky ground as Weicks' never testified that there was a "verbal altercation" between himself, Miguel Lozano ("Lozano"), and Nelson Zelaya ("Zelaya"). Rather, Weicks' testified that Lozano told Zelaya "this motherfucker," but did not say this directly to Weicks, and that Weicks then simply set the bin down, turned around on his forklift, and

[25] The Union incorrectly refers to Julio Porres as "Julio Portes" throughout both its exceptions and brief. UX, at 4; UBX.

[26] While the Union's exception mistakenly states that Lozano and Zelaya are "bin painters," it is uncontested that they were bin washers at the time of the incident.

continued to do his work. Tr., 396:18-397:18 (Weicks). Similarly, regarding the second alleged time this occurred, Weicks testified that Lozano was "talking to Nelson Zelaya" when he said "this motherfucker", but Weicks did not respond. Tr., 399:5-14 (Weicks). At no point did Weicks testify that there was a verbal altercation between himself, Lozano, and Zelaya, or that he ever said anything to Lozano and Zelaya. In fact the entire incident was predicated on Weicks' refusal to talk with Lozano and Zelaya because he viewed them as beneath him; thus the Union's claim of a verbal altercation is nonsensical.

In its brief, the Union tries to further extend this exception to argue that Porres' testimony "confirmed" that "Lozano had called [Weicks'] this motherfucker." UBX, at 29. The Union is attempting to make multiple false inferences. Julio Porres description of the incident does not support the Union's claim that Porres testimony confirms Weicks' testimony that Lozano called him "this motherfucker." Porres made no mention of Lozano or Zelaya swearing at or cussing at Weicks; in fact, Porres testified that he could not hear what they were saying. Tr., 1478:13-1479:18 (Porres).

The Union also makes the claim that Judge Wedekind "erred in failing to take into account the record evidence that Weicks was unpopular among some Sun Valley employees because of his role with the union." UX, # 12(f). However, this is not supported by the record. The Union points to Porres' testimony, which stated that "[o]nce [Weicks] became the rep for the Union, his whole attitude changed towards us. He became isolated and to himself. There was no more communication with us." Tr., 1478:2-4 (Porres); UBX, at 29. This testimony does not show, as the Union claims, that Weicks was unpopular among some Sun Valley employees. Rather, this testimony only goes to show that Weicks began to treat others differently because of his Union

status. It does not show that anyone at Athens treated Weicks any differently because of his involvement with the Union.

In short, Judge Wedekind's findings related to Porres are fully supported by the record.

Accordingly, Judge Wedekind properly took into account the testimony of Porres and correctly weighed the testimony of Porres when deciding the credibility of Weicks and his claims.

C. Judge Wedekind's decisions regarding the testimony of Luis Rubio and Lupe Ramirez were internally consistent and supported by the record.

The Union attempts to make the claim that Judge Wedekind's decision was inconsistent regarding whether Weicks told Luis Rubio ("Rubio"), the Operations Lead at the Sun Valley Yard, and Ramirez that Lozano referred to him as a "motherfucker" or a "fool." UX, # 12(g); UBX, at 29-30. Again, the Union is either purposefully twisting the words of Judge Wedekind or did not read the decision carefully to determine his actual reasoning. The Union refers to Judge Wedekind's detailed footnote 64 on pages 33-34 of his decision. In this footnote, Judge Wedekind thoroughly explains why he credits Rubio's accounts of the conflict over that of Weicks, and why "there are substantial reasons to doubt Weicks' account." ALJD, at 33 n.64. Judge Wedekind explains why Weicks' testimony that Lozano called him a "motherfucker" and that Weicks told Rubio about the cussing was not credible. However, as is often done in judicial opinions, Judge Wedekind gives another additional reason, other than Weicks' lack of credibility, for why he believes Rubio and Ramirez when they stated that Weicks' did not mention to them the alleged swearing by Lozano: that swearing was common at the yard so Weicks may have not brought this to the attention of Rubio and Ramirez as swearing was common place. *Id.* at 34 n.64. Accordingly, Judge Wedekind's decision is not inconsistent but rather provides multiple reasons why he credits Rubio's and Ramirez' testimony over that of Weicks. ALJD, at 33-35 nn.64-65.

Lastly, the Union argues that Judge Wedekind "erred in discrediting Weicks' testimony because he did not create a written statement during the disciplinary process." UX, # 12(h). This is, yet again, a misstatement of Judge Wedekind's decision. Judge Wedekind did not discredit Weicks for not having provided a written statement. Rather, Judge Wedekind considered the fact that Rubio had a detailed written statement, written the same day of the incident, which supported Rubio's and Ramirez' accounts that Weicks never told them that Lozano called him a "motherfucker" or a "fool" in making his credibility determinations regarding this incident. ALJD, at 33 n.64. Consequently, the Union's exception here is based on an incorrect interpretation of Judge Wedekind's decision and should not be granted.

Accordingly, the Board should not overrule Judge Wedekind's decision as the clear preponderance of all the relevant evidence shows that Judge Wedekind's credibility resolutions regarding the discipline of Weicks were not only not incorrect, but well founded in the record. [27]

[27] In its brief, the Union makes the assertion that Judge Wedekind "discredited Weicks' testimony because Weicks testified that Lozano and Zelaya had never previously complained about him returning a bin." UBX, at 30. This allegation should be rejected as the Union failed to provide this exception in the "Charging Party Teamsters Local 396's Exception to Administrative Law Judge's Decision and Recommended Order" but rather tried to sneak it in unnoticed in the brief. Current NLRB Rules and Regulations § 102.46 (a)(ii) ("Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged will be deemed to have been waived."). The Union makes the absurd claim that Weicks' unsupported and contradicted testimony that he brought back the dirty bin four times is "telling" as it "makes it likely that Lozano and Zelaya were doing so on purpose, in order to aggravate Weicks." UBX, at 30. No wonder the Union attempted to sneak in this "exception," as it is a bold, unsupported statement. The record indicates that this only occurred twice. Nonetheless, the Union argues that "Julio Por[r]es testified that he had *never* had to return a bin more than once, much less four times. Tr. 1483:25-1484:8." UBX, at 30. However, the Union neglected to point out that Porres testified that he was trained to communicate to the bin washers when a bin is still dirty so that the problem can be fixed and the same dirty bin is not returned to the bin painting area without being cleaned. Tr., 1476:1-1477:19 (Porres). Rubio testified that this communication is important because at times there is grease on the bins, which makes the bins appear as though they are clean but the grease prevents paint from sticking and thus the bins must be cleaned again. Tr., 1535:22-1536:2 (Rubio). Nonetheless, Weicks testified that he never said anything to Lozano or Zelaya about why he was returning the bin. Tr., 397:12-21, 399:13-14 (Weicks). Thus, even though it is extremely unlikely, based on the record, that Weicks had to return the bin four times, even if it was true, he could have prevented this by explaining to Lozano and Zelaya why he was returning the bin.

D. None of the Union's exceptions, even if granted, should impact the final decision of Judge Wedekind regarding the allegations involving Weicks.

Under *Wright Line*, the standard applicable in this situation, after the General Counsel has met its initial burden of showing that the employee's alleged union activity was a motivating factor in the employer's decision to discipline him, the burden of persuasion shifts to the employer to demonstrate that it would have given the same discipline even in the absence of the employee's protected conduct. *United Rentals*, 350 NLRB 951, 951 (2007); *Electrolux Home Products*, 368 NLRB No. 34, at 3 (citations omitted). If the employer would have done so, then the allegations should be dismissed. As thoroughly explained in Athens' Post-Hearing Brief and Judge Wedekind's decision, Athens established that it would have issued Weicks the low-level discipline even if Weicks' union activities were a motivating factor (which it was not). Athens' Post-Hearing Brief, at 76-77; ALJD, at 36:1-11.

The Union tries to evade this issue by making the claim that Weicks only stated that Lozano and Zelaya were "below" or "beneath" him because it was beneath him to respond to their provocations. UBX, at 30-31. This is inaccurate, as Weicks' exact testimony was that "My – my – verbatim what I said is, man, I don't want to talk to him, he's below me." Tr., 405:22-23, 469:10-15 (Weicks). Regardless of the Union's rather clever, albeit dishonest, misinterpretation of Weicks' statement, it has no impact. Even if Lozano had cussed at Weicks and brought this to the attention of Rubio or Ramirez, Weicks would have still received a written warning for making the comment that his co-workers were beneath him. Tr., 1621:10-1622:8 (Ramirez).

Accordingly, the Union's Exception number 12 (and various sub-exceptions) should be dismissed as Judge Wedekind correctly held that Athens did not violate Sections 8(a)(1) and 8(a)(3) of the Act by disciplining Weicks.

VI. CONCLUSION.

Athens respectfully requests that the Board dismiss the Exceptions and adopt Judge Wedekind's rulings, findings, and conclusions that: Athens did not violate Section 8(a)(1) of the National Labor Relations Act regarding an alleged threat to Garcia, Athens did not violate Section 8(a)(1) of the Act by allegedly interrogating Bermudez about his union sympathies, Athens did not violate Section 8(a)(1) or 8(a)(3) of the Act when it terminated Bermudez, and Athens did not violate Section 8(a)(1) or 8(a)(3) of the Act by disciplining Damian Weicks.

Respectfully submitted,

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My business address is 1925 Century Park East, Suite 500, Los Angeles, CA 90067-2506.

3. I served copies of the following documents (specify the title of each document served):

RESPONDENT'S ANSWERING BRIEF TO THE CHARGING PARTY'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

4. I served the documents listed above in item 3 on the following persons at the addresses listed:

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5.

a. ☐ **By Personal Service**. I personally delivered the documents on the date shown below to the persons at the addresses listed above in item 4.

☐ **By United States mail.** I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses in item 4 and:

1. ☐ placed the envelope for collection and mailing on the date shown below, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at Los Angeles, California.

☐ **By messenger service.** I served the documents on the date shown below by placing them in an envelope or package addressed to the person on the addresses listed in item 4 and providing them to a professional messenger service for service. (A

declaration by the messenger must accompany this proof of service or be contained in the Declaration of Messenger below.)

☒ **By e-mail or electronic transmission.** I caused the documents to be sent on the date shown below to the e-mail addresses of the persons listed in item 4. I did not receive within a reasonable time after the transmission any electronic message or other indication that the transmission was unsuccessful.

2. I served the documents by the means described in item 5 on (*date*): **March 6, 2020**.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

3/6/20	Lynne Conner	*/s/ Lynne Conner*
DATE	(TYPE OR PRINT NAME)	(SIGNATURE OF DECLARANT)